Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1004

THE STUYVESANT INSURANCE COMPANY,
PETITIONER,

v.

COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

PAUL T. SMITH
JEFFREY M. SMITH
M. SUZANNE PRESLEY
HARVEY R. PETERS
89 State Street
Boston, Massachusetts 02109
Tel. (617) 523-8116
Attorneys for Defendant-Petitioner

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The petitioner, The Stuyvesant Insurance Company, by its attorneys, prays that a writ of certiorari issue to review the judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts, entered on September 28, 1979.

Opinion Below

The (summary) judgment of the Superior Court of the Commonwealth of Massachusetts, printed in Appendix A

hereto, *infra,* p. 18, is not reported. The opinion of the Appeals Court for the Commonwealth of Massachusetts printed in Appendix B hereto, *infra,* p. 19, has not yet been reported. The Order of the Supreme Judicial Court, printed in Appendix C hereto, *infra,* p. 20, is not reported. The Judgment After Rescript of the Superior Court, printed in Appendix D hereto, *infra,* p. 21, is not reported.

Jurisdiction

The opinion of the Appeals Court for the Commonwealth of Massachusetts was released on June 29, 1979. (Appendix B, p. 19). The Order of the Supreme Judicial Court for the Commonwealth was entered on September 28, 1979. (Appendix C, p. 20). The Judgment After Rescript was entered in the Supreme Court on October 5, 1979 (Appendix D, p. 21). Jurisdiction of this Court is invoked under 28 U.S.C. 1257.

Questions Presented

I. Whether the Commonwealth's failure to notify the defendant surety of the reinstatement of its original bail bond, after the removal of its principal's prior default, which substantially increased the risk to the defendant surety and impaired various rights of the defendant, without its knowledge or consent, violated the defendant's right to due process.

II. Whether the forfeiture of the defendant's bail bond violated the defendant's right to due process where the Commonwealth had failed to notify the defendant surety of the date and time when the defendant was required to produce its principal in court, particularly where the defendant could not have determined the appointed time from the docket or other court records.

Constitutional Provisions Involved

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: ". . . nor shall any State deprive any person of life, liberty, or property without due process of law."

Statement of the Case

Prior Proceedings

The Commonwealth of Massachusetts commenced this civil action against the defendant, The Stuyvesant Insurance Company (hereinafter Stuyvesant), seeking to recover the face amount of a bail bond executed by it, claiming that the defendant and its principal had defaulted by failing to appear before the Superior Court. (R. 45-46).[1]

The defendant in this case filed a motion to dismiss alleging that there had been a failure to join the defendant's principal as a party and that the principal was subject to service of process despite his allegedly being a fugitive. (R. 53). The defendant's motion to dismiss was subsequently denied and thereafter the defendant filed an answer in each case, pursuant to Rule 12(a) of the Massachusetts Rules of Civil Procedure. The defendant's answer alleged, among other things, that the bail bond had become void prior to the default referred to in the complaint, that the Commonwealth contributed to the non-appearance of the defendant's principal, that the Commonwealth had breached its obligation to notify the defendant and its principal of the date and time when its principal was required to appear before the Court and that the Commonwealth had violated the defendant's rights to due process and otherwise failed

[1] "R." refers to the appendix filed in the Appeals Court.

to fulfill its obligations under the contract of bail. (R. 62-64).

The Commonwealth filed a form motion for summary judgment, originally unsupported by any affidavit. (R. 54).

The defendant filed an Affidavit Of Thomas Corey In Opposition To The Plaintiff's Motion For Summary Judgment. (R. 57-61). The affidavit of Thomas Corey stated, among other things, that neither Stuyvesant nor its principal had been called into Superior Court or notified to appear before the Superior Court as alleged by the plaintiff.[2] The defendant's affidavit also established that giving such notice to the surety was customary in other jurisdictions (including other counties in the Commonwealth and other states) and such notice was an implicit obligation of the state. In addition, the affidavit of Thomas Corey stated that at no time prior to the default on November 7, 1977, relied upon by the Commonwealth, was Stuyvesant given any notice of the return of the indictment against its principal, the entry of his case in the Superior Court, the removal of a prior default and the release of the principal in connection therewith. (R. 58-59.)

The Commonwealth filed an Affidavit In Support Of Its Motion For Summary Judgment. (R. 55-56). The form affidavit merely verified that Appendix A to each complaint was a certified copy of the criminal indictment against the defendant's principal (R. 47-48) and that Appendix B to each complaint was a certified copy of the bail bond in question (R. 49-52).

The Commonwealth's affidavit did not verify that Stuyvesant and its principal had been called into court or notified to appear on the date they were defaulted, and failed to controvert the allegations of the defendant's affidavit in this case that such notice had not been given, and that

[2] The allegation that the Commonwealth had failed to notify Stuyvesant's principal was "upon information and belief."

the defendant had not been notified of the removal of the prior default, among other things.

On July 20, 1978, a hearing was held before the Superior Court. After hearing oral argument, at which time the defendant raised the due process issues presented by this petition, the Superior Court granted the plaintiff's motion for summary judgment in this case. (R. 44).

Judgment in this case was entered on August 8, 1978, for the face amount of the bail bond. (R. 67). The defendant duly filed its notice of appeal (R. 44) to the Appeals Court for the Commonwealth of Massachusetts. (In the Appeals Court this case was consolidated with other similar actions on bail bonds in the aggregate face amount of $18,000.00).

In its brief to the Appeals Court, Stuyvesant, at pages 25-26, raised the issue of due process stating:

> "Accordingly, the decision by the Court to remove a default may adversely affect its contractual rights as a surety and such a decision cannot, consistent with due process, be made without any notice to the surety. The defendant also submits that it is a denial of due process, on other grounds, to fail to provide the surety with any notice either before or after the decision is made to remove the default and reinstate the same bail bond."

The defendant, before the Appeals Court, also relied upon its answer which alleged that "the Commonwealth of Massachusetts violated its obligation to the defendant under the aforesaid bail bond by virtue of its failure to give the defendant any notice of the proceedings in the Superior Court prior to or in connection with the default entered on November 7, 1977." (R. 62-64).

On June 29, 1979, after briefing and oral argument, the Appeals Court released its slip opinion affirming the judgment of the Superior Court. The Appeals Court ruled that the defendant as surety on a bail bond was not required to be notified when its principal is required to appear in court and further ruled, in effect, that a bail bond may be reinstated upon the court's removal of a prior default by the surety's principal without any notice to the surety. (Appendix B, p. 19).

On July 19, 1979, the defendant filed an Application For Further Appellate Review by the Supreme Judicial Court pursuant to Mass. G.L. c. 211A §11 and Appellate Rule 27.1, Massachusetts Rules of Appellate Procedure.

In its Application to the Supreme Judicial Court, Stuyvesant also raised the due process issues presented by this petition citing, *inter alia,* at pages 15-16 of its Application, the case of *People* v. *Wilshire Insurance Company,* 46 CA. 3d 216, 119 Cal. Rptr. 917 (1975) for the proposition "notice must be given to protect the adverse party's right to be heard on the issue as matter of due process of law."

On September 28, 1979, the Supreme Judicial Court entered an Order, without an opinion, denying the defendant's Application For Further Appellate Review.

On October 5, 1979, Judgment After Rescript was entered in the Superior Court.

Statement of Facts

On December 3, 1976, the defendant, Stuyvesant, executed a form bail bond, "framed" in accordance with the requirements of Mass. G.L. c. 276 §65, in connection with a criminal complaint pending against one Vincent R. Sestito before the Malden District Court. (R. 49-52). The bail bond, Appendix B to the complaint, was also signed by Sestito. Thereafter, on February 10, 1977, an indictment was returned and filed in the Middlesex Superior Court charging Sestito with the crime of distributing cocaine. (R. 47-48). Stuyvesant was not notified of the return of the indictment. (R. 58-59). On February 23, 1977, Sestito and Stuyvesant were defaulted in the Superior Court and a *capias* was issued. (R. 48, 60). Stuyvesant was not notified of the default. (R. 58-59). On March 7, 1977, the prior default was removed, the defendant was arraigned, pleaded not guilty and was released. (R. 48-60). Stuyvesant was not notified of these proceedings. (R. 58-59). The case was continued to March 21, 1977. On March 25, 1977, the case was continued to April 15, 1977, for trial at which time it was continued to May 19, 1977, at which time it was continued to May 4, 1977, at which time it was continued to May 19, 1977, at which time it was continued to May 26, 1977, at which time it was continued to June 16, 1977. (R. 48, 60). On November 7, 1977,[3] Sestito and Stuyvesant were again defaulted and a *capias* issued. (R. 48, 60). At no time prior thereto was Stuyvesant notified that Sestito was required to appear before the Superior Court on that date nor was Stuyvesant called into the Superior Court on that date. (R. 58-59). Moreover, Stuyvesant alleged, upon information and belief, that Sestito was not notified to appear before the Superior Court on that date (R. 59) and there is nothing in the Commonwealth's affidavit (R. 55-56) to establish that any such notice was in fact given or why they were defaulted on November 7, 1977. At no time prior to the entry of default on that date was Stuyvesant given any notice of the return of the indictment against Sestito, the entry of his case in the Superior Court, the removal of the prior default or the release of Sestito in connection therewith. (R. 58-59). Finally, prior to the

[3] There is nothing in the record to explain the hiatus from June 16, 1977, or whether the case was further continued to November 7, 1977, or the significance of the November 7, 1977, date.

entry of the default on November 7, 1977, there was nothing on the docket (R. 60-61) or other court papers in the underlying criminal case (R. 47-52) from which Stuyvesant could have become apprised that its principal was required to appear before the Superior Court on November 7, 1977.

It is also undisputed by the Commonwealth that as a practical matter there is a reasonable likelihood that the risk to a surety, such as the defendant, on a bail bond may be increased where its principal who has previously defaulted is again released without further bail as occurred in this case. (R. 59).

Equally, it is uncontroverted that the Commonwealth failed in this case to fulfill its obligation to notify Stuyvesant, as surety on a bail bond, of the date and time when its principal would be required to appear before the Superior Court. (R. 58). The failure of the authorities of Middlesex County to furnish such notice in this case is in sharp contrast to the custom to give such notice to the surety in other jurisdictions, (both in other counties within the Commonwealth and in other states). (R. 58).

Reasons for Granting the Writ

I. THE COMMONWEALTH'S FAILURE TO NOTIFY THE DEFENDANT SURETY OF THE REINSTATEMENT OF ITS ORIGINAL BAIL BOND, AFTER THE REMOVAL OF ITS PRINCIPAL'S PRIOR DEFAULT, WHICH SUBSTANTIALLY INCREASED THE RISK TO THE DEFENDANT SURETY AND IMPAIRED VARIOUS RIGHTS OF THE DEFENDANT, WITHOUT ITS KNOWLEDGE OR CONSENT, VIOLATED THE DEFENDANT'S RIGHT TO DUE PROCESS.

This case presents the need for an analysis of the specific dictates of due process in an area not heretofore considered by this Court; yet the state courts below have decided the federal questions presented in a manner which is not in

accord with the general principles of due process previously enunciated by this Court. In particular, the case presents issues as to whether a state may affect the rights of a surety to a bail bond, *inter alia*, by increasing its risks and by denying it a meaningful opportunity to surrender its principal or otherwise protect its rights, without any prior or subsequent notice to the surety. The decision of the courts below that no such notice need be given to the surety violates the principles of due process set forth in *Memphis Light, Gas and Water Division* v. *Craft*, ___ U.S. ___, 98 S.Ct. 1554 (1978); *Fuentes* v. *Shevin*, 407 U.S. 67 (1972); *Bell* v. *Burson*, 402 U.S. 535 (1971); *Boddie* v. *Connecticut*, 401 U.S. 371 (1972); *Lambert* v. *California*, 355 U.S. 225 (1957) and *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

In *Memphis, Light, Gas and Water Division* v. *Craft*, *supra*, 98 S.Ct. at 1560, this Court stated:

> "The Fourteenth Amendment places procedural constraints on the actions of government that work a deprivation of interests enjoying the stature of 'property' within the meaning of the Due Process Clause. Although the underlying substantive interest is created by 'an independent source such as state law,' federal constitutional law determines whether that interest rises to the level of a 'legitimate claim of entitlement' protected by the Due Process Clause.
>
> "Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane* v. *Central Hanover Bank & Trust Co.*, *supra*, 339 U.S. at 313.

In *Fuentes* v. *Shevin, supra,* 407 U.S. at 80, this Court held: "For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.' *Baldwin* v. *Hale,* 1 Wall. 223, 233, 17 L.Ed. 531... It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaninful manner.' *Armstrong* v. *Manzo,* 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed. 2d 62."

The operative facts herein are not in dispute and establish that substantive rights of the defendant surety were affected by the state without prior, or subsequent, notice: At no time prior to the entry of the default on November 7, 1977, was the defendant given any notice of the fact that on March 7, 1977, a prior default against the defendant's principal was removed, automatically reinstating the bail bond under the decisions of the courts below, and the principal was released. The release of the principal, who had previously defaulted, without further bail, served to increase the risk to the surety. (R. 58-59).

The release of the principal on March 7, 1977, and the reinstatement of the bail bond without notice to the surety also served to deprive the defendant of a meaningful opportunity to surrender the principal and apply to the court for remission of any penalty pursuant to Mass. G.L. c. 276, §69.[4] Equally, failure to give the surety notice deprived it of the right to suggest "reasonable restrictions on the principal's movements" as a further condition of release so that

[4] Mass. General Law c. 276 §69 provides: "Bail may surrender their principal at any time after default made upon the recognizance, or the principal may surrender himself, in the manner provided in the preceding section; and the court where the default is recorded may, upon application, remit the whole or any part of the penalty, if satisfied that the default of the principal was not with the connivance or consent of the bail."

the surety could better assure that the principal would not further default. See *Commonwealth* v. *The Stuyvesant Insurance Company,* 336 Mass. 611, at 621 (1975).

Finally, even if the Commonwealth had the right to reinstate the bail bond, without the consent of the surety, it served no purpose to do so as the surety was never apprised that its obligations had been revived. The failure to give notice thwarted the very purpose for which the state imposes bail, to assure the presence of the accused in the criminal case, as the surety was deprived of the opportunity to take practical steps to assure its principal's further appearances before the court.

The case of *People* v. *Wilshire Insurance Company,* 46 C.A. 3d 216, 119 Cal. Rptr. 917 (1975) is substantially on all fours with the facts of this case and appears to be in substantial accord with such other case law as may exist in other jurisdictions with similar bail systems: In *People* v. *Wilshire Insurance Company, supra,* a prior order forfeiting a bond had been set aside and bail reinstated, without notice to the surety. The California appellate court held that the failure to give notice of the initial default invalidated the bond.

The California court stated, *supra* at 220-222: "There are, of course, conceivable ways in which Wilshire could have suffered prejudice. We may speculate, for example, upon the right of Wilshire to re-evaluate its position in light of the defendant's failure to appear. Wilshire might have decided to be relieved of the risk and surrender the defendant in the criminal case to custody, which it had a right to do. (Pen. Code, § 1300) The surety would have been alerted to Carson's tendency not to appear and might have taken steps to assure his appearance at the trial, his failure to appear thereat being the ultimate cause of the forfeiture herein. *The real point is that by the failure to receive notice the surety was deprived of the opportunity*

to consider all factors potentially producing an increased risk . . . in an adversary proceeding where an order may affect the rights of an adverse party, notice must be given to protect the adverse party's rights to be heard on the issue as a matter of due process of law.'' (Emphasis added.)

Even if the Commonwealth had unquestioned discretionary power to reinstate the bail bond, due process requires notice and some opportunity to be heard to ensure that the government exercised its discretion wisely, to ensure that there has been an appropriate record for later judicial review, and to permit the surety to have urged policy and prudential considerations to influence the exercise of discretion, even if the facts necessary to establish the government's power to act were not in dispute. In fact, these considerations may even be more significant than ensuring the sufficiency of the facts because if there were inadequate evidence as to the relevant facts, concerning the removal of the default, the surety could avail itself of substantive judicial review, without need to invoke its right to due process. Due process protection is most crucial when the government's power to act is clear, because in that situation it is the only protection against unwise, arbitrary or unfair use of that power. See *Fuentes* v. *Shevin, supra,* 407 U.S. at 87; *Goss* v. *Lopez,* 419 U.S. 565, 579-580, 581 (1975) wherein the Court imposed a requirement of notice and hearing, stating ''In any event, his discretion will be more informed . . .''; and 88 Harv. L. Rev. 1510, *et seq.* (1975).

''There is nothing peculiar about litigation between the Government and its citizens that should deprive those citizens of a right to be heard.'' *Walker* v. *City of Hutchinson,* 752 U.S. 112, 117 (1956). ''While the problem of additional expense must be kept in mind, it does not justify denying a hearing meeting the ordinary standards of due process. *Goldberg* v. *Kelly,* 397 U.S. at 261, 90 S.Ct. at 1017, quoting

Kelly v. *Wyman,* 294 F.Supp. 893, 901 (S.D.N.Y. 1968).'' *Bell* v. *Burson, supra,* 402 U.S. at 540-541.

II. The Forfeiture of the Defendant's Bail Bond Violated the Defendant's Right to Due Process Where the Commonwealth Had Failed To Notify the Defendant Surety of the Date and Time When the Defendant Was Required To Produce Its Principal in Court, Particularly Where the Defendant Could Not Have Determined the Appointed Time From the Docket or Other Court Records.

The defendant submits that it was an elementary violation of its right to due process to forfeit its bail bond for the violation of an obligation to produce its principal at a time and place the defendant did not know and could not determine without notice from the state. The decisions of the courts below that the state need not give the defendant surety such notice is inconsistent with established principles of due process enunciated by this Court.

The prevailing rule, as enunciated by this Court, in a long line of cases, is that, except in extraordinary situations, not present here, procedural due process requires that notice and hearing must precede any penalty or forfeiture.

This Court in *Mullane* v. *Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314-315, stated:

> ''The fundamental requisite of due process of law is the opportunity to be heard. *Grannis* v. *Ordean,* 234 U.S. 385, 394, 34 S.Ct. 779, 783, 58 L.Ed. 1363. This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest. . . .

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. . . . The notice must be of such nature as reasonably to convey the required information. *Grannis* v. *Ordean, supra,* and it must afford a reasonable time for those interested to make their appearance, *Roller* v. *Holly, supra,* and *cf. Goodrich* v. *Ferris*, 214 U.S. 71, 29 S.Ct. 80, 53 L.Ed. 914."

While "a State, can, for example, enter a default judgment against a defendant who, after adequate notice, fails to make a timely appearance, see *Windsor, supra,* 93 U.S. at 278, 23 L.Ed. 914 . . . the Constitution does require . . . '*an opportunity* * * * granted at a meaningful time and in a meaningful manner,' *Armstrong* v. *Manzo*, 380 U.S. 540, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965) (emphasis added), 'for [a] hearing appropriate to the nature of the case,' *Mullane* v. *Central Harover Bank & Trust Co., supra,* 339 U.S. at 313, 70 S.Ct. at 657." *Boddie* v. *Connecticut, supra*, 401 U.S. at 378.

The decisions of the Massachusetts courts in the instant case fly in the face of this principle that the right to notice and hearing, if it is to serve its full purpose, must be given at a meaningful time.

In the instant case it is uncontroverted that the defendant was never notified of its obligation to the State under the bail contract until after the court ordered that the defendant and its principal be defaulted, presumably for failure to appear on November 7, 1977.[5] (R. 58-59)

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[5] In *Commonwealth* v. *The Stuyvesant Insurance Company,* 336 Mass. 611, 614 (1975), the Supreme Judicial Court construed the form bail bond as obligating the surety "to produce its principal at the appointed time."

Failure to notify the defendant of his obligation to produce the principal until after the default deprived the defendant of the "opportunity to comply with the law and avoid its penalty." *Lambert* v. *California*, 355 U.S. 225, 229 (1957).

In *Lambert* v. *California, supra*, 355 U.S. at 283, this Court held that "notice is required before property interests are disturbed, before assessments are made . . . Notice is required in a myriad of situations where a penalty or forfeiture might be suffered for mere failure to act." Here, the court below defaulted the defendant surety on November 7, 1977, without any prior notice, under circumstances where the defendant could not have determined the appointed time from the docket or other court records.

The defendant need not take the position in these cases that the surety must be given notice of *every* continuance; it might be a surety's obligation to keep itself apprised of such matters if they were reflected in the court records. Here, it could not do so. In this case neither the docket nor the other court records would have apprised the defendant that it was required to produce its principal on November 7, 1977. (R. 47-52, 60-61). The surety was not even given notice of the return of the indictment against its principal. (R. 58-59) For all the surety knew, an indictment had never been returned without which the surety would have no obligation to produce its principal in the Superior Court. Thus, the surety did not even have a starting point for keeping itself posted with regard to proceedings in the Superior Court.

The Commonwealth may argue that notice, if any, given to the defendant's principal, is sufficient notice to the surety. " 'Great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact.' *McDonald* v. *Mabee*, 243 U.S. 90, 91, 37 S.Ct. 343, 61 L.Ed. 608, L.R.A. 1917F, 458." "Notice

must be such as is reasonably calculated to reach interested parties. Where the names and post office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than mails to apprise them of its pendency." *Mullane* v. *Central Hanover Bank & Trust Co., supra,* 339 U.S. at 318, 320.

The issue in this case is not whether the state can enter judgment in a summary fashion after a default, as referred to in *Boddie* v. *Connecticut, supra,* 401 U.S. at 378, or in *American Surety Co.* v. *Baldwin,* 287 U.S. 98 (1932). The issue is whether the state can collect the penal sum of a bail bond for a violation of the obligation to produce defendant's principal, where the state's failure to notify the surety of the appointed time deprived the surety of the "opportunity to comply with the law and avoid its penalty." *Lambert* v. *California, supra,* 355 U.S. at 229. Since the surety could not have determined the appointed time from the court records, fundamental fairness and due process require that the state provide the requisite notice to the surety.

" 'The fundamental requisite of due process of law is the opportunity to be heard,' *Grannis* v. *Ordean,* 234 U.S. 385, 394, 34 S.Ct. 779, 783, 58 L.Ed. 1363 (1914), a right that 'has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to . . . contest.' *Mullane* v. *Central Hanover Trust Co., supra,* 339 U.S. at 314, 70 S.Ct. at 657. See also *Armstrong* v. *Manzo,* 380 U.S. 545, 550, 85 S.Ct. at 1187, 1190, 14 L.Ed.2d 62 (1965); *Joint Anti-Fascist Committee* v. *McGrath,* 341 U.S. 123, 168-169, 71 S.Ct. 624, 646-647, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring). . . . 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.' *Baldwin* v. *Hale,* 1 Wall. 223, 233, 17 L.Ed. 531 (1864)." *Goss* v. *Lopez,* 419 U.S. 565, 579 (1975).

Conclusion

The decisions of the courts below raise serious and important questions which will affect the availability of bail by means of surety bonds, and the procedures followed by sureties, at least within the Commonwealth of Massachusetts. Equally, this case raises novel issues concerning the surety's right to due process in the context of bail administered by the courts of the Commonwealth of Massachusetts. The decisions below are not in accord with the principles of due process previously enunciated by this Court and served to deprive the defendant of its property in violation of the Fourteenth Amendment. It is therefore respectfully submitted that the petition for a writ of certiorari be granted.

Respectfully submitted,

PAUL T. SMITH
JEFFREY M. SMITH
M. SUZANNE PRESLEY
HARVEY R. PETERS
89 State Street
Boston, Massachusetts 02109
Tel. (617) 523-8116
Attorneys for Defendant-Petitioner

APPENDIX A

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss. SUPERIOR COURT

Civil Action No. 78-2126

COMMONWEALTH OF MASSACHUSETTS,
PLAINTIFF,
v.
STUYVESANT INSURANCE COMPANY,
DEFENDANT.

JUDGMENT
(SUMMARY)
(PURSUANT TO MASS. R. CIV. P. 56)

This action came on to be heard before the Court, MITCHELL, J. presiding, upon the motion of the Plaintiff for summary judgment pursuant to Mass. R. Civ. P. 56—the parties having been heard—and the Court having considered the Pleadings and Affidavits finds there is no genuine issue as to material fact and that the Plaintiff is entitled to a judgment as a matter of law, it is ORDERED AND ADJUDGED that:

Plaintiff recover of Defendant the sum of $2,000.00, with costs.

Dated at Cambridge, Massachusetts August 8, 1978.

Form of Judgment Approved:

Associate Justice of the Court
(s) JOSEPH S. MITCHELL

EDWARD J. SULLIVAN, *Clerk*
(s) JAMES J. LYNCH, III
Assistant Clerk

8/9/78 *Copies to*

APPENDIX B

M. 78-901
78-902
78-903

Released Jun 29 1979
Appeals Court

COMMONWEALTH *v.* THE STUYVESANT INSURANCE COMPANY
(and two companion cases).

1. The allegations in the affidavits of the defendant's agent to the effect that the defendants in the three underlying criminal cases may have been defaulted improperly due to insufficiency of notice were "made on information and belief, as opposed to personal knowledge, [and thus] are to be disregarded in considering a motion for summary judgment." *Shapiro Equip. Corp.* v. *Morris & Son Constr. Corp.*, 369 Mass. 968 (1976). See *Stetson* v. *Board of Selectmen of Carlisle*, 369 Mass. 755, 763 n.12 (1976). 2. The contention that the courts' removal of prior defaults by the defendant's principals in two of the cases, coupled with releases of the principals without notice to the defendant, had the effect of discharging the defendant as surety, was decided adversely to the defendant in *Commonwealth* v. *Stuyvesant Ins. Co.*, 366 Mass. 611, 617-618, and nn.8, 9 (1975). 3. Nothing in our statutes or in the case last cited requires that a surety be notified whenever its principal is required to appear in court. 4. The defendants in the underlying criminal cases were not indispensable parties to the present actions by the Commonwealth against the surety. *New Amsterdam Cas. Co.* v. *Weymouth*, 97 F.Supp. 565, 566 (D.Mass. 1951).

Judgments affirmed.

APPENDIX C

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT FOR THE COMMONWEALTH,
At Boston, September 28, 1979.

ORDER

IT IS HEREBY ORDERED, that the following Applications for Further Appellate Review be denied:

* * *

M-1285 COMMONWEALTH
v.
THE STUYVESANT INSURANCE COMPANY
(and two companion cases)
(Middlesex Superior Nos. 78-2124 thru 78-2126; A.C. Nos. 78-901 thru 78-903)

* * *

By the Court,
(s) PATRICK J. HURLEY
PATRICK J. HURLEY, *Assistant Clerk*

September 28, 1979

APPENDIX D

COMMONWEALTH OF MASSACHUSETTS
MIDDLESEX, SS. SUPERIOR COURT

No. 78-2126

COMMONWEALTH OF MASSACHUSETTS,
v.
STUYVESANT INSURANCE COMPANY,

JUDGMENT AFTER RESCRIPT

This action came on for entry of judgment upon receipt of the rescript from the Appeals Court for the Commonwealth of Massachusetts (Rules of Appellate Procedure, Rule 28) and thereupon, upon consideration thereof, it is ORDERED and ADJUDGED:

That the plaintiff recover of the defendant the sum of $2,000.00 with costs.

Dated at Cambridge, Massachusetts
this fifth day of October, 1979.

(s) PAUL F. MAHONEY
Assistant Clerk

Supreme Court, U.S.
FILED
JAN 28 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1004

THE STUYVESANT INSURANCE COMPANY,
Petitioner.

v.

COMMONWEALTH OF MASSACHUSETTS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT
OF THE COMMONWEALTH OF MASSACHUSETTS.

Respondent's Brief in Opposition to Certiorari.

FRANCIS X. BELLOTTI
Attorney General
BARBARA A.H. SMITH
Assistant Attorney General
Chief, Criminal Appellate
Section
ANNETTE C. BENEDETTO
Assistant Attorney General
One Ashburton Place
Boston, MA 02108
(617) 727-2240

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TABLE OF AUTHORITIES CITED.

Cases.

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Cardinale v. Louisiana,
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Respondent's Brief in
Opposition to Certiorari.

Respondent is not dissatisfied with the petitioner's citation of the opinion below. Respondent disputes the statement of jurisdiction on the grounds that the petitioner has not satisfied the requirement of 28 U.S.C. 1257(3) for the reasons stated below.

STATEMENT OF THE CASE

The petitioner seeks review of a decision upholding the forfeiture of a bail bond by the surety upon default of the principal.

A bail bond was executed by the petitioner, Stuyvesant Insurance Company, on December 3, 1976 in the amount of $2,000 guaranteeing the appearance of Vincent R. Sestito. (R. 49-51). Sestito was indicted on drug charges on February 10, 1977. (R. 60). On February 23, 1977 he was defaulted but the default was removed on March 7, 1977 when defendant appeared and pled not guilty at his arraignment. (R. 60). The docket reflects several continuances. (R. 60). On November 7, 1977 Sestito was

defaulted and a capias was issued to the District Attorney. (R. 60).

On April 24, 1978 a complaint was filed by the Commonwealth against Stuyvesant seeking to recover the face amount of the bail bond. Copies of the indictment and bail bond were filed with the complaint. Stuyvesant filed a motion to dismiss on May 8, 1978 citing the failure to join the principal. (R. 44; 45; 53).

On July 5, 1978 the Commonwealth moved for summary judgment and an affidavit by an Assistant District Attorney was submitted in support thereof. The complaint and affidavit read together alleged that Stuyvesant had entered into the bail bond agreement; that the principal was called

into court but failed to appear and was defaulted; and that Stuyvesant by the terms of the bail bond, was indebted to the Commonwealth for the sum stipulated therein. (R. 54-56).

On July 12, 1978 Stuyvesant submitted an affidavit by Thomas Corey in opposition to the Commonwealth's motion for summary judgment. The affidavit stated that the address of the principal contained on the bail bond made the principal subject to service of process at that address. Stuyvesant's affidavit also stated that it, as surety, was not notified of the principal's required appearance dates; that "upon information and belief" the principal was not properly notified of his appearance

date; and that in other jurisdictions a surety is given notice of the appearance dates of its principal. (R.57-58).

On July 20, 1978 Stuyvesant's motion to dismiss for failure to join the principal was denied and the Commonwealth's motion for summary judgment was allowed. (R.54).

Stuyvesant filed an answer on July 27, 1978 in which it alleged that the bail bond was voided prior to the default; that the Commonwealth contributed to the non-appearance of the principal; and that Stuyvesant was not notified of the appearance dates or called into court. (R.62-63).

Summary judgment against Stuyvesant was ordered for the full amount of the bond on August 8, 1978. (R.67).

The petitioner filed a notice of appeal in the Massachusetts Appeals Court. On June 29, 1979 the Appeals Court affirmed the lower court's judgment. On July 19, 1979 the petitioner filed an Application for Further Appellate Review by the Supreme Judicial Court. On September 28, 1979 the application was denied.

Reasons for Denying the Writ

CERTIORARI SHOULD BE DENIED BECAUSE THE PETITIONER FAILED TO PRESENT ITS CONSTITUTIONAL CLAIM TO THE STATE COURT.

The Supreme Court of the United States may review state court judgments only where a title, right, privilege or immunity is specially set up or claimed under the Federal Constitution and such claim is first presented to the state courts with

fair precision. Crowell v. Randell, 10 Pet. (35 U.S.) 368, 390-397 (1836); Cardinale v. Louisiana, 394 U.S. 437, 438-439 (1969); 28 U.S. C. 1257(3). If the highest state court has failed to decide the Federal question, "it will be assumed that the omission was due to want of proper presentation in the state courts unless the aggrieved party in this court can affirmatively show to the contrary." Street v. State of New York, 394 U.S. 576, 582 (1968). The respondent submits that the petitioner in the instant action has failed to establish that the threshold jurisdictional requirement of 28 U.S.C. 1257(3) has been met. The constitutional claim now being raised was not argued or

briefed in the Appellate Court nor was the Massachusetts Appeals Court apprised of the fact that a Federal constitutional claim was being advanced. The petitioner included two ambiguous references to "due process" in its 35-page brief to the state appellate court and those allusions were offered to support Stuyvesant's contention that a 1975 Massachusetts decision impliedly required notice to a surety prior to forefeiture under the bail system. The Massachusetts court was not thereby informed that any Federal right, privilege, or immunity was being asserted and it "proceeded in its determination of the cause without any thought that it was expected to decide a Federal question."

Oxley Stave Co. v. Butler County, 166 U.S. 648, 655 (1897). The mere recital of the words "due process" absent any reference to the United States Constitution or any rights thereunder, do not impart a Federal constitutional dimension to an action. It may be assumed that the petitioner was referring to the state constitution which includes a due process clause, affording no basis for invoking the court's jurisdiction. Bowe v. Scott 233 U.S. 658, 665 (1914); New York Central & H.R. Co. v. New York, 186 U.S. 269, 273 (1902). New York ex rel Bryant v. Zimmerman, 279 U.S. 63, 67-8 (1928).

This court's "only power over state judgments is to correct them to the extent

they incorrectly adjudge Federal rights." Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 565 (1976). Since no Federal rights were previously asserted, or decided the respondent respectfully submits the petition should be denied.

Respectfully submitted,

FRANCIS X. BELLOTTI
Attorney General
BARBARA A.H. SMITH
Assistant Attorney General
Chief, Criminal Appellate Section
ANNETTE C. BENEDETTO
Assistant Attorney General
One Ashburton Place
Boston, MA 02108
(617) 727-2240